

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 1, 2008

VERONICA MONDE BARONE v. ANTHONY F. BARONE, ET AL.

Appeal from the Circuit Court for Cumberland County

No. CV004002 John J. Maddux, Jr., Judge

No. E2006-01394-COA-R3-CV - FILED AUGUST 28, 2008

This is a lawsuit filed by Veronica Monde Barone (“Wife”)¹ seeking to execute on real property allegedly owned by her former² husband, Anthony F. Barone (“Husband”), in satisfaction of a sizable judgment in favor of Wife entered against Husband by a Canadian court. The property at issue is a farm located in Cumberland County. In 1990, Husband’s mother owned the property. In that year, she executed a quitclaim deed to the farm, leaving the space for the grantee’s name blank. She handed the deed to Husband, her only son. Wife claims that after she obtained a judgment against Husband, he inserted the name of his son Frank Barone (“Son”) on the deed as the grantee, and the deed was then filed in the Register of Deed’s office. Wife asserts that this was a fraudulent conveyance, that Husband still owns the farm, and that the farm is subject to execution in partial satisfaction of the judgment. Son claims the deed was valid and he is the proper record owner of the farm. Following a trial, the trial court agreed with Wife and held that the purported conveyance of the farm to Son was fraudulent. Son appeals. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Linda J. Hamilton Mowles, John T. Buckingham, and Preston A. Hawkins, Knoxville, Tennessee, for the appellant, Frank A. Barone.

C. Douglas Fields, Crossville, Tennessee, for the appellee, Veronica Monde Barone.

¹ Although Husband and Wife have been divorced for several years, for ease of reference we will refer to them as “Husband” and “Wife”.

² The parties were married on March 23, 1989. The date of their divorce is not stated in the record.

OPINION

I.

On February 22, 1974, Husband purchased the subject farm for \$210,000. A warranty deed was filed with the Cumberland County Register of Deeds on April 1, 1974. Less than three years later, on October 13, 1977, Husband and his then-wife, Julia Barone, sold the farm to Husband's mother, Mary Barone, for \$210,000. A warranty deed was filed in the Cumberland County Register of Deeds the same day.

On October 29, 1990, Mary Barone executed a quitclaim deed with respect to the farm. The portion of the quitclaim deed where the grantee was to be identified was left blank. Wife was one of the witnesses to the execution of the quitclaim deed. After the 1990 deed was signed, it was given by Mary Barone to Husband.

On January 29, 1998, Wife obtained a default judgment against Husband in the Ontario Court (General Division) in Canada. The amount of the default judgment was \$1,800,000. Less than three months after Wife obtained the judgment against Husband, the quitclaim deed executed in 1990 was filed with the Cumberland County Register of Deeds on March 19, 1998. Son's name had been typed onto the quitclaim deed as the grantee.³ Mary Barone died on March 10, 1999.

Wife filed the present lawsuit on July 28, 1999. In her petition, Wife sought to domesticate the Canadian judgment. The petition later was amended to seek divestment of title to the farm. Wife sued Husband and Son. According to the amended petition:

[Husband] purchased real property in Cumberland County, Tennessee on the 22nd day of February, 1974, ... with the deed to said property being recorded in the Register's Office....

[Husband] transferred said property to his natural Mother, Mary Barone to hold said property in trust for his use and benefit. That the transfer of said property is recorded in the Register's Office in Cumberland County....

Upon information and belief, no actual consideration was paid for the transfer as set forth in the Deed.

That on the 29th day of October, 1990, [Husband] had his mother, Mary Barone sign a Deed wherein the grantee's name was left blank. That your Petitioner was a witness to the signature of Mary Barone to the blank Deed as directed by [Husband].

³ Frank Barone is Husband's biological son and Wife's former stepson.

That on the date the deed was executed, [Husband] indicated the property had been sold, but he was uncertain as to how the buyer desired it be titled.

That in fact, no buyer actually existed, and [Husband] regained and exercised full authority and control to determine the disposition of the property thereafter.

Your Petitioner avers that after she obtained the January 22, 1998 Judgment ... against [Husband], the deed to the Tennessee property was recorded titling the property in the name of [Husband's] natural son, Frank A. Barone. The deed reflecting that transfer is recorded in the Register's Office... and that deed was recorded on the 19th day of March, 1998....

That although the face of the deed ... indicates the property was transferred to Frank A. Barone on October 29, 1990, a handwritten letter by [Husband] dated February 28, 1991 exists wherein the property in Tennessee is referenced noting that the deed remains in [Husband's] possession, and that the deed is blank....

Your Petitioner avers that [Husband] maintains substantial assets most of which are secreted in some fashion, or held in trust to avoid any Judgment against him.

Petitioner avers that the Cumberland County property is held in trust by Frank A. Barone for the benefit and use of [Husband], and that the deed is a fraudulent attempt to avoid satisfaction of Petitioner's Judgment. (original paragraph numbering omitted)

A trial was conducted in October 2002 with Wife being called as the first witness. Wife testified that she was present and witnessed Mary Barone sign the 1990 deed. Mary Barone was in a nursing home when she signed the deed. Wife explained that Husband simply presented the document to his mother, who was "tied down in a wheelchair," and she signed the document. No one made mention of the fact that there was no grantee listed on the deed. Wife testified that "from the day I met him," he always told Wife that he was the person who actually owned the farm.

Wife identified a letter written by Husband in longhand and addressed "Dear John." The letter was dated February 28, 1991. The first two sentences of the letter read as follows: "Sorry I had to leave, however, the Good Lord is taking care of me. I left behind the following:" The letter goes on to discuss Husband's assets and related matters. Included in the letter is the following:

Also in the papers in my above mentioned table you may find a blank deed executed by my mother Mary Barone for the Farm in Tenn. Please fill in the blank space as grantees "Frank Barone and Julie Christie Barone Jointly."

Julie Christie Barone is the daughter of Husband, the sister of Son, and the former stepdaughter of Wife. As to how Wife came into possession of the February 28, 1991, letter, she testified as follows:

After he left me in 1993, I went through some of his personal effects that he had left back and I found it in a box with his Bibles.

Wife testified that she sued Husband in Canada because he had forged her name on a power of attorney and sold valuable stocks that she owned, and he then spent the money for his personal use. On cross-examination, Wife stated that Husband was not always truthful. According to Wife, she found out after their marriage that he had been married six times before. Wife added that Husband used to be a licensed attorney, but that he had been disbarred. To Wife's knowledge, at the time of trial, the farm was being managed by Son.

The second and final witness at trial was Julia (Barone) Hampton ("Hampton"), one of Husband's former wives and the mother of Son, Frank Barone. Hampton testified that she and Husband acquired the farm in 1974, then sold it to Mary Barone in 1977. Hampton claimed that prior to the 1990 deed that listed no grantee, Mary Barone had given Hampton another deed to the farm. This other deed listed as grantees Son and his sister, Julie Barone.⁴ Hampton testified that she lost this deed and it was never recorded. Another deed was prepared in 1990. Hampton received the 1990 deed in the mail and there was a note attached stating to hold the deed until Son turned twenty-one. Hampton did as the note instructed. She held the deed for about eight years then had it filed once Son turned twenty-one. Hampton testified that when she received the 1990 deed, the grantee was identified as Son.⁵ Hampton identified documents which showed that Mary Barone paid the property taxes on the farm through 1997. Son paid the property taxes on the farm from 1998

⁴ Hampton's testimony about this lost deed was very inconsistent. On direct examination she testified that the grantees on the deed were both Son and his sister Julie Barone. At other times she stated Son was the only grantee. Hampton also stated that the grantees were identified on the deed when she received the deed in the mail. Then on cross-examination she stated that the deed was blank where the grantees were supposed to be identified.

⁵ Hampton acknowledged that in an affidavit prepared prior to trial, she stated that when she received the 1990 deed, no grantee was listed. She explained the inconsistency by stating she was under a lot of stress when the affidavit was prepared and signed. Hampton then was questioned about a deposition she had given. In this deposition Hampton testified that she believed she was the person who filled in Son's name on the grantee line in the 1990 deed. At trial Hampton stated that she could not have been the person who typed Son's name on the deed because she did not own a typewriter. Hampton then stated that she was the one who typed the legal description of the property onto the deed. Hampton then stated, "Come to think of it, I may have typed the whole thing," referring to the 1990 deed. Hampton then stated that when she received the 1990 deed, it may or may not have been blank and she was not even sure if she "opened it." Obviously, Hampton's testimony was quite confusing and inconsistent, and it is very difficult to determine which deed she was referring to at any particular time.

through the date of trial. Hampton testified that Mary Barone was “emphatic” that Husband not receive the farm. Hampton acknowledged that while Mary Barone wanted the farm to go to Son and his sister, only Son was listed on the 1990 deed.

Wife and Hampton were the only witnesses to testify at trial. Although Son was represented by counsel at trial, he did not testify and chose not to attend the trial. Husband never appeared or otherwise defended this lawsuit and he likewise chose not to attend the trial. Even though he chose not to defend this lawsuit, Husband did file a separate lawsuit in the United States District Court for the Middle District of Tennessee seeking to have the Canadian default judgment set aside. The federal court lawsuit was dismissed. Because he never answered or otherwise defended this lawsuit, the trial court entered a default judgment against Husband on August 20, 2001.

Approximately two years after trial, the trial court issued a memorandum opinion. The trial court restated the two issues that were tried: (1) whether the 1990 deed was a fraudulent conveyance; and (2) whether the “plaintiff’s Motion for Partial Summary Judgment alleging the deed was void because it was executed in blank should be granted?” According to the trial court:

The deed in question was an October 29, 1990, deed purporting to transfer the property at issue. In this deed there was no grantee named. . . . This purported deed was delivered to the grantor’s son, Anthony Barone at the time it was executed.

There is no credible evidence to support the theory that Mary Barone intended for Frank Barone to be the grantee of this blank deed. There is also no credible evidence that Mary Barone intended that the deed be delivered to Frank Barone nor that it was delivered to him at her direction. Also, there is no credible evidence in the record that Mary Barone ratified any changes in the deed, re-executed the deed or redelivered it.

The most logical inference and conclusion regarding Mary Barone’s intent is that her act of executing and delivering a blank deed to Anthony Barone was intended as a transfer of the property in question. It was her intent to make a gift of the property to Anthony Barone. He was the sole heir of Mary Barone. Since he held a blank deed to the property, he also had control over the property and its disposition.

The blank deed was delivered to Anthony Barone and was held blank by Anthony Barone even after the delivery. The deed was never recorded until a significant judgment was rendered against him. The name of Frank Barone was filled in on the deed and the deed was placed on record after the judgment was taken against Anthony

Barone. It is reasonable to assume that this action was taken to keep Anthony Barone's interest in the property from appearing in legal records. It was likely that Anthony Barone would inherit that property from Mary Barone. She was of advance age. The court listened closely to the testimony of [Wife]. The court finds that she was a credible witness. The testimony of Julia Hampton was confused if not confusing. The court finds her testimony to be less than credible.

Several badges of fraud associated with this conveyance are found to be present in the facts of this case. They are as follows:

- (a) That defendant Anthony Barone failed to appear and defend the transaction in question.
- (b) Defendant Frank Barone also failed to appear and testify concerning his claim of ownership to the property.
- (c) The transfers involved only family members.
- (d) No consideration was stated for the transfer.
- (e) A large judgment came down just prior to the alleged transfer of the real property.
- (f) The evidence presented by the defendants was less than credible.
- (g) The documentation does not support the defendants' theories.
- (h) The documentation provided by the defendants was not supportive of the defendants' theories of the case.

Based on the foregoing Findings of Fact the court holds that the deed from Mary Barone to Frank Barone is void and inoperative. The court further finds that the conveyance was a fraudulent conveyance as identified in Tennessee Code Annotated section 66-3-101....

The deed in question did not name a grantee. When Mary Barone executed the deed she delivered the deed with no instructions of any kind. The court is of the opinion that a deed requires both a grantor and a grantee. Consequently, the deed in question is void. For a blank deed to become valid it would have to be re-acknowledged and

redelivered by the grantor or someone with written authority to act on behalf of the grantor. This did not occur.

Delivery of a deed is an essential element of its validity. A deed does not become effective to pass title until it is delivered. The facts of this case show that there was no valid delivery of this deed to the alleged [grantee]. The court is persuaded that the Motion for Partial Summary Judgment in this case should be and is hereby granted.

Following entry of the final judgment, Son filed a motion to alter or amend the final judgment, which was denied by the trial court.

II.

Son appeals raising the following issues, which we take verbatim from his brief:

1. Whether the trial court erred in granting Plaintiff's motion for partial summary judgment holding that there was not a valid delivery of the 1990 deed conveying the subject property from Mary Barone to Frank Barone?
2. Whether the trial court erred in failing to grant Defendant's motion for dismissal under Tennessee Rule of Civil Procedure 41.02(2) given that Plaintiff failed to present any evidence of a fraudulent conveyance?
3. Whether the trial court erred in holding that the 1990 conveyance from Mary Barone to Frank Barone was a fraudulent conveyance?
4. Whether the trial court erred in granting the Plaintiff relief upon the theory of fraudulent conveyance when Plaintiff was a witness and signatory to the conveyance?

III.

As this litigation progressed, Wife filed a motion for partial summary judgment. It never was ruled upon by the trial court prior to trial. The final judgment entered by the trial court followed a plenary trial and the trial court clearly relied upon trial testimony when rendering its judgment. Because the final judgment followed a trial, the trial court incorrectly stated in the final judgment that it was granting Wife's motion for partial summary judgment. The trial court was not granting summary judgment; rather, it was entering a judgment following a trial. Therefore, we will apply the standard of review applicable to final judgments entered following a non-jury trial. A review of findings of fact by a trial court is *de novo* upon the record of the trial court, accompanied by a

presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); **Brooks v. Brooks**, 992 S.W.2d 403, 404 (Tenn. 1999). Review of questions of law is *de novo*, without a presumption of correctness. See **Nelson v. Wal-Mart Stores, Inc.**, 8 S.W.3d 625, 628 (Tenn. 1999).

In our review of the trial court's judgment, it is important to note that the trial court gave little to no weight to the testimony of Husband's former wife, Hampton. The court found there was "no credible evidence to support the theory that Mary Barone intended for [Son] to be the grantee of this blank deed" and that Hampton's testimony was "less than credible." In **Wells v. Tennessee Bd. of Regents**, our Supreme Court observed:

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. See *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. See *Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. See *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999). Hence, in the case at bar, we view the evidence ever mindful of the fact that the trial court failed to accredit the testimony of Hampton and there is nothing in this record to warrant our disregarding of this credibility determination.

IV.

Son's first issue, as restated to conform to the appropriate standard of review, is his claim that the evidence preponderates against the trial court's ruling that Mary Barone did not intend to deed the property to Son via the 1990 deed. According to Son, the "undisputed testimony of Julia Hampton clearly indicate[s] that Mary Barone's intention was that Frank Barone and his sister inherit the property when they turned 21." We disagree with the characterization of Hampton's testimony as "undisputed." Wife testified that Husband consistently referred to the farm as his property even after the 1990 deed was executed. Wife's testimony is consistent with Husband's 1991 letter which establishes that Husband was continuing to exercise dominion and control over the farm well after the blank 1990 deed was executed and delivered to him. Furthermore, as previously noted by us, the trial court simply did not find Hampton's testimony to be credible.

In *In re Estate of Atkinson*, 746 S.W.2d 709 (Tenn. Ct. App. 1987), this Court stated as follows:

[T]he delivery of a deed is a matter of intention which may be inferred from the circumstances. *Early v. Street*, 192 Tenn. 463, 471, 241 S.W.2d 531, 534 (1951); *Cockrell v. Tuell*, 61 Tenn. App. 423, 431, 454 S.W.2d 713, 717 (1970). Possession of the deed by the grantee creates a strong presumption of delivery. *Cockrell v. Tuell*, *id.* at 431, 454 S.W.2d at 717 (quoting *Kirkman v. Bank*, 42 Tenn. (2 Cold.) 397, 402 (1865). Possession is prima facie evidence of delivery, absent opposing circumstances. *Savage v. Bon Air Coal, Land & Lumber Co.*, 2 Tenn. Ch. App. 594, 648 (1902); *Goodlett v. Goodman Coal & Coke Co.*, 192 F. 775, 778-9 (6th Cir. 1912). The burden is on the party contesting the delivery to rebut the presumption. *Goodwin v. Ward*, 65 Tenn. 107, 108 (1873). To overcome the presumption, the party must present “the most satisfactory evidence, . . . counter evidence of superior weight, or . . . clear and convincing evidence.” *Cockrell v. Tuell*, 61 Tenn. App. at 432, 454 S.W.2d at 717.

Atkinson, 746 S.W.2d at 712.

Son relies on *Atkinson* when arguing that it was Mary Barone’s intention to deed him the farm and Wife failed to overcome the presumption established by the fact that he currently possessed the 1990 deed. We disagree. The facts establish that the deed was delivered to Husband after it was signed by Mary Barone in a nursing home. In addition, the testimony of Wife coupled with Husband’s 1991 letter establish that after the deed was executed, it was delivered to Husband, not to Son. The 1991 letter further shows that not only did Husband have possession of the deed, but he had sole discretion as to whose name would be inserted onto the grantee line of the deed. Because Husband possessed and controlled the deed, this weighs heavily against Son’s dual claims (1) that he had possession of the deed and (2) that Wife failed to overcome the presumption discussed on *Atkinson*. The facts do not preponderate against the trial court’s conclusion that it was the intention of Mary Barone to gift the farm to Husband and that it was Husband who accepted delivery of the 1990 deed. This is even more apparent when considering the trial court’s credibility determinations. If either Husband or Son had competent or credible evidence to the contrary, they certainly had the opportunity to present that evidence at trial; however, they both chose not to attend. Because we conclude that the evidence does not preponderate against the trial court’s determination, it necessarily follows that the trial court did not err when it denied Son’s Tenn. R. Civ. P. 41.02(2) motion to dismiss following the close of Wife’s proof. We therefore reject Son’s second issue as well.

The trial court’s final judgment is a bit confusing because it appears, on an initial reading, to contradict itself. First, the trial court stated that, with the 1990 deed, Mary Barone intended to

make a gift and pass title of the farm to Husband. This would mean that there was a valid deed to Husband. However, later in the opinion, the trial court stated that the 1990 deed was invalid because no grantee was identified. It seems to this Court that what the trial court intended to hold was that the 1990 deed was valid as a gift to Husband and effectively transferred title in the farm to him, even without Husband being identified as the grantee. It was Husband's later attempt to insert Son's name onto the deed as the grantee which the trial court deemed was invalid, fraudulent, and which lacked the requisite delivery from Mary Barone to Son.

Son's third issue is his claim that the trial court erred when it held that the conveyance from Mary Barone to him was fraudulent. We think this issue misinterprets the trial court's holding. Because Mary Barone had given the farm to Husband as a gift with the 1990 deed, there was no 1990 deed from Mary Barone to Son; such a deed did not exist, at least not until Wife obtained a judgment against Husband. In short, there was no deed from Mary Barone to Son until Husband, who had been deeded the property as a gift in 1990, thereafter inserted Son's name onto the deed in an attempt to divest title from himself so the farm was not subject to being executed upon by Wife in partial satisfaction of the judgment against him. It was this act by Husband that was deemed fraudulent.

T.C.A. § 66-3-305(a) (2004) provides:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

T.C.A. § 66-3-305(b) (2004) then lists several factors that the courts can look to when ascertaining if a conveyance is fraudulent. These factors include:

(1) The transfer or obligation was to an insider;

- (2) The debtor retained possession or control of the property transferred after the transfer;
- (3) The transfer or obligation was disclosed or concealed;
- (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) The transfer was of substantially all the debtor's assets;
- (6) The debtor absconded;
- (7) The debtor removed or concealed assets;
- (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Applying these factors, we cannot conclude that the trial court erred when it determined that Husband's attempt to convey the property to Son by inserting Son's name as the grantee onto the 1990 deed was fraudulent. As set forth by the trial court, the transfer attempting to deed the farm to Son was among family members, the transfer at issue occurred shortly after Wife obtained a sizable judgment against Husband, and neither Husband nor Son presented any credible proof at trial to support their theories of the case. The credible evidence that was presented at trial strongly supports the conclusion reached by the trial court that Husband's attempt to convey the farm to Son by inserting his name onto the 1990 deed was a fraudulent attempt to divest title of the farm from Husband to Son so that it was not subject to execution to partially satisfy Wife's judgment against Husband.

Son's final issue is his claim that Wife was not entitled to any relief because she was a witness to the execution of the 1990 deed and she, therefore, has unclean hands. Specifically, Son argues:

In granting [Wife] relief under a fraudulent conveyance theory, the trial court disregarded the open and notorious fact that [Wife] herself was a signatory and witness to the 1990 Deed that is the basis of the allegation of fraud. . . . Accordingly, she obtained relief from the court with unclean hands. . . .

Again, this argument misses the point. The trial court held that the 1990 deed was a valid gift from Mary Barone to Husband. The 1990 deed, therefore, was valid to transfer title to Husband. This transaction is what Wife witnessed. The fraudulent transaction occurred many years later when Husband inserted Son's name onto the deed in an attempt to vest title of the farm to Son. Wife did not witness this transaction. Accordingly, we reject Son's argument that Wife had unclean hands.

In summary, we have considered all of the various arguments advanced by Son. After carefully reviewing the entire record in this case, we are unable to conclude that the trial court erred when it held that the 1990 deed was a gift which transferred title of the farm to Husband and his later attempt to transfer title to Son after Wife obtained a judgment against Husband was fraudulent. Finally, we note that after the trial court entered its judgment, Wife filed a motion for writ of attachment. The trial court denied the motion so that this appeal could proceed. On remand, the trial court is instructed to give due consideration to Wife's motion.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Frank Barone. This case is remanded to the trial court with instructions and for collection of costs assessed below, pursuant to applicable law.

CHARLES D. SUSANO, JR., JUDGE